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Attorney for Tokico USA Incorporated

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
	:	
In re	:	Chapter 11
	:	
DELPHI CORPORATION, <u>et al.</u> ,	:	Case No. 05-44481 (RDD)
	:	
Debtors.	:	(Jointly Administered)
	:	
-----X		

**OBJECTION OF TOKICO (USA), INC.  
TO  
NOTICE OF ASSUMPTION AND ASSIGNMENT OF CONTRACT**

Tokico (USA), Inc. ("Tokico"), by and through its undersigned attorneys, hereby objects to the assumption and assignment of its contract with Delphi Corporation (the "Debtor") to Beijing West Heavy Industries Co., Ltd. and certain of its affiliates (collectively, the "Buyer"). In support of this objection, Tokico hereby states as follows:

**PRELIMINARY STATEMENT**

1. Tokico is in receipt of that certain Notice of Assumption and Assignment of Executory Contract Or Unexpired Lease In Connection With Sale of Brakes and Ride Dynamics Businesses, dated May 1, 2009, by which the Debtor seeks to assume and

assign to the Buyer a certain pre-petition purchase order, PO # 550069884 (the “Purchase Order”), which had been entered into between Tokico and the Debtor. A true and accurate copy of the Purchase Order is attached hereto as Exhibit A.

2. The first page of the Purchase Order provides that it expires no later than December 31, 2008. Therefore, the Purchase Order has terminated and no executory contract exists which may be assumed or assigned.

### **ARGUMENT AND LAW**

3. A contract may not be assumed under section 365 if it has already expired according to its terms. Counties Contracting & Const. Co. v. Constitution Life Ins. Co., 855 F.2d 1054, 1061 (3d Cir. 1988) (holding contract could not be assumed where debtor failed to assume contract before it expired 60-days post-petition) citing, In Re Anne Cara Oil Co., 32 B.R. 643 (Bankr.D.Mass.1983); see e.g., In re Pesce Baking Co., Inc., 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984) (holding that collective bargaining agreement that expired by its own terms prior to hearing on motion to reject was no longer executory because “there can be no performance by either party under the terms of the agreement”); In re Spectrum Info. Techs., Inc., 193 B.R. 400, 404 (Bankr.E.D.N.Y.1996) (finding employment agreement no longer executory where debtor discharged employee after petition was filed and prior to motion to reject agreement, as employee “no longer had any material unperformed obligations under the ... [a]greement”); 2 COLLIER ON BANKRUPTCY ¶ 365.04[2] (15th ed. rev. 2009).

4. Once a contract is no longer in existence, the right to assume it is extinguished. Counties Contracting, 855 F.2d at 1061; see also Penn Traffic Co., 524

F.3d at 381-82 (discussing cases where courts have held contracts expiring post-petition are no longer executory).

5. Although the significant date for determining whether a contract is executory is at the time when the petition is filed (In re Riodizio, Inc., 204 B.R. 417, 421 (Bankr.S.D.N.Y.1997)), “events after the filing ... may cause the contract to be regarded as not executory when the motion to assume or reject was made, such as contracts which expired post-petition by their own terms after the date of [filing] but before the motion was heard.” In re Child World, 147 B.R. 847, 852 (Bankr.S.D.N.Y.1992).

6. The Purchase Order is not an executory contract because it expired by its own terms on December 31, 2008. Accordingly, the Purchase Order is not capable of being assumed and assigned pursuant to section 365.

WHEREFORE, for the foregoing reasons, Tokico respectfully requests that the Court enter an order denying the Debtor’s request to assume and assign the Purchase Order, and grant such other relief as the Court deems just and proper.

Dated: May 8, 2009

/s/ Paul J. Ricotta  
Paul J. Ricotta (PR-6002)  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.  
One Financial Center  
Boston, MA 02111  
(617) 542-6000 (tel.)  
(617) 542-2241 (fax)

## **EXHIBIT A**

# DELPHI

Energy & Chassis Systems

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**Buyer:**  
DELPHI  
ENERGY & CHASSIS SYSTEMS  
5820 DELPHI DR  
TROY MI 48098

**Requirements Contract**  
PO Number 550069884 Date Issued 02/03/2005  
Version 02/03/2005 15:11:10

**Deliver to:**  
*Please deliver to:  
See Delivery Schedule*

TOKICO INC  
301 MAYDE DR  
BEREA KY 40403  
Buyer:  
DELPHI  
ENERGY & CHASSIS SYSTEMS  
5820 DELPHI DR  
TROY MI 48098

Vendor No: 1001318  
DUNS No: 187300876

**Payment Terms:** ZMMZ **Currency:** USD  
Payment settled on 2nd, 2nd Month  
**Incoterms:** FOB-Freight Collect

Deliver to:

Please

*GMT 265 Hex-free parts*

Item No.	Material No.	Description	Plant		
00010	22231526	ELC COMPRESSOR MODULE	HP01 DELPHI E & C PASS BY SALES		
Valid From	Valid To	Currency	Price	Price Unit	UOM
01/01/2005	06/30/2005	USD	76,370.00	1,000	PC
07/01/2005	06/30/2006	USD	75,224.45	1,000	PC
07/01/2006	12/31/2008	USD	74,096.08	1,000	PC

This Requirement Contract is for 100% unless otherwise specified.

**Notes**  
This Contract replaces previous contract # --.  
\*\*\*\*\*  
\*\*\*\*\*  
As a supplier to Delphi Energy & Chassis you must use a Delphi

Purchasing Contact: Ranek, Danuta

Phone: 248-813-4559

Fax: 248-813-4588

Contact Address:

DELPHI ENERGY & CHASSIS SYSTEMS  
5725 Delphi Drive,  
TROY MI 48098-2815

**DELPHI**

Energy &amp; Chassis Systems

Page 2 of 2

TOKICO INC  
301 MAYDE DR  
BEREA KY 40403

**Requirements Contract**

PO Number  
550069884  
Version  
02/03/2005 15:11:10

Date Issued  
02/03/2005

Item No.	Material No. Description	Plant
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**Notes Continued**

approved transportation provider when Delphi is paying the bill. If you require assistance or routing instructions please contact Menlo Worldwide Logistics at 800-805-9433. Failure to follow these instructions could result in a charge back to your company

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Delphi requires suppliers of productive material be capable of communicating material forecasts, material schedules, shipping notices and associated information through Electronic Data Interchange (EDI). To insure that EDI communications are accurate and effective, each productive material supplier will be required to become EDI Certified by exhibiting their ability to send and/or receive the appropriate EDI messages in accordance with applicable standards prior to providing productive material. EDI Certification will be conducted and coordinated by the EDI Competency organization.

An Internet electronic form alternative solution is intended to provide relief in situations where establishing an in-house EDI capability is a hardship for a supplier providing limited material.

Please refer to Delphi's website: [www.delphi.com](http://www.delphi.com) then Suppliers/Supplier Community Portal / Supplier Standards, for additional information.

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Seller acknowledges and agrees that Buyer's General Terms and Conditions are incorporated in, and a part of, this contract and each purchase order, release, requisition, work order, shipping instruction, specification and other document issued by Buyer or accepted in writing by Buyer, whether expressed in written form or by electronic data interchange, relating to the goods and/or services to be provided by Seller pursuant to this contract (such documents are collectively referred to as this "Contract"). A copy of Buyer's General Terms and Conditions is available upon written request to Buyer or via the Internet at Delphi's website, [delphi.com](http://delphi.com). Seller acknowledges and agrees that it has read and understands Buyer's General Terms and Conditions. If Seller accepts this Contract in writing or commences any of the work or services which are the subject of this Contract, Seller will be deemed to have accepted this Contract and Buyer's General Terms and Conditions in their entirety without modification. Any additions to, changes in, modifications of, or revisions of this Contract (including Buyer's General Terms and Conditions) which Seller proposes will be deemed to be rejected by Buyer except to the extent that Buyer expressly agrees to accept any such proposals in writing.

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Title to goods shall transfer from seller to buyer upon arrival at buyer's consuming plant.

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Paul J. Ricotta, Esq. (PR-6002)  
MINTZ LEVIN COHN FERRIS  
GLOVSKY AND POPEO, P.C.  
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Boston, MA 02111  
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Facsimile: (617) 542-2241

Attorney for Tokico USA Incorporated

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Debtors.	:	(Jointly Administered)
	:	
-----X		

**CERTIFICATE OF SERVICE**

I, Paul J. Ricotta, Esq., hereby certify under penalty of perjury, that on May 8, 2009, I caused a true and correct copy of the Objection of Tokico (USA), Inc. to Notice of Assumption and Assignment of Contract to be served by electronic mail and/or by overnight mail to all persons on the attached Service List.

Dated: May 8, 2009

/s/ Paul J. Ricotta  
Paul J. Ricotta

**DELPHI MASTER SERVICE LIST  
(Overnight Mail)**

Delphi Automatic Systems LLC  
5725 Delphi Drive  
Troy, MI 48098  
ATTN: Legal Staff

Delphi Corporation  
5725 Delphi Drive  
Troy, MI 48098  
ATTN: Deputy General Counsel,  
Transactional & Restructuring

Ron E. Meisler, Esq.  
Allison K. Verderber Herriott, Esq.  
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Donald Bernstein, Esq.  
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Xiao Yong, Esq.  
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Brian Masumoto  
Office of the United States Trustee  
for the Southern District of New York  
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Delphi Corporation  
Master Service List

COMPANY	CONTACT	ADDRESS1	ADDRESS2	CITY	STATE	ZIP	PHONE	FAX	EMAIL	PARTY/FUNCTION
Barnes & Thornburg LLP	Peter A. Clark	One North Wacker Drive	Suite 4400	Chicago	IL	60606-2833	312-214-5668	312-759-5646	pcclark@barnesandthornburg.com	Counsel to Rectical Interiors, Inc.
Brown Rudnick Berloff & Israel LLP	Robert J. Stark	Seven Times Square		New York	NY	10036	212-209-4800	212-209-4801	rstark@brownrudnick.com	Indenture Trustee
Cohen, Weiss & Simon	Bruce Simon	330 W. 42nd Street		New York	NY	10036	212-356-0231	212-695-5436	bsimon@cwslaw.com	
Curtis, Mallet-Prevost, Colt & Mosie LLP	Steven J. Resman	101 Park Avenue		New York	NY	10178-0061	212-696-6000	212-697-1559	sresman@curtislaw.com	Counsel to Flextronics International, Inc.; Flextronics International USA, Inc.; Mutek Flexible Circuits, Inc.; Sheldahl de Mexico S.A. de C.V.; Northfield Acquisition Co.; Flextronics Asia-Pacific Ltd.; Flextronics Technology (M) Sdn. Bhd.
Davis, Polk & Wardwell	Donald Bernstein Brian Resnick	450 Lexington Avenue		New York	NY	10017	212-450-4092 212-450-4213	212-450-3092 212-450-3213	db Bernstein@dpw.com bresnick@dpw.com	Counsel to Debtor's Postpetition Administrative Agent
Delphi Corporation	Sean Corcoran, Karen Craft	5725 Delphi Drive		Troy	MI	48098	248-813-2000	248-813-2491	scorcoran@delphi.com kcraft@delphi.com	Debtors
Flextronics International	Carrie L. Schiff	305 Interlocken Parkway		Bloomfield	CO	80021	303-927-4853	303-652-4716	cschiff@flextronics.com	Counsel to Flextronics International USA, Inc.
Flextronics International USA, Inc.	Paul W. Anderson	2090 Fortune Drive		San Jose	CA	95131	408-428-1308		panderson@flextronics.com	Creditor Committee Member
Freeseale Semiconductor, Inc.	Richard Lee Chambers, III Brad Eric Steiner	6501 William Cannon Drive West	MD: OE16	Austin	TX	78735	512-896-6357	512-895-3090	rlchambers@freeseale.com brad.steiner@freeseale.com	Counsel to Equity Security Holders Committee
Fried, Frank, Harris, Shriver & Jacobson	Jennifer L. Rouburg	One New York Plaza		New York	NY	10004	212-859-8000	212-859-4000	jrouburg@ffhs.com	Financial Advisors to Debtors
FTI Consulting, Inc.	Richard S. Eisenberg	3 Times Square	11th Floor	New York	NY	10036	212-847-7010	212-841-9350	rs Eisenberg@fticonsulting.com	Creditor Committee Member
General Electric Company	Valerie Venable	9930 Kinsey Avenue		Huntersville	NC	28078	704-992-5075	866-585-2386	valerie.venable@ge.com	Counsel to Employee Benefits
Groom Law Group	Lonie A. Hassel	1701 Pennsylvania Avenue, NW		Washington	DC	20006	202-857-0620	202-659-4503	lhassel@groom.com	Counsel to Hexcel Corporation
Hodgson Russ LLP	Stephen H. Gross	1540 Broadway	24th Fl	New York	NY	10036	212-751-4300	212-751-0928	sgross@hodgsonruss.com	Counsel to General Motors Corporation
Honigman Miller Schwartz and Cohn LLP	Frank L. Gorman, Esq.	2290 First National Building	660 Woodward Avenue	Detroit	MI	48226-3583	313-465-7000	313-465-8000	fgorman@honigman.com	Counsel to General Motors Corporation
Internal Revenue Service	Robert B. Weiss, Esq.	2290 First National Building	660 Woodward Avenue	Detroit	MI	48226-3583	313-465-7000	313-465-8000	rweiss@irs.gov	Michigan IRS
Internal Revenue Service	Attn: Insolvency Department, Maria Valero	477 Michigan Ave	Mail Stop 15	Detroit	MI	48226	313-628-3648	313-628-3602	maria.valero@irs.gov	IRS
IUE-CWA	Conference Board Chairman	290 Broadway	5th Floor	New York	NY	10007	212-436-1038	212-436-1931	confer@iue-cwa.org	Creditor Committee Member
Jefferies & Company, Inc.	William O. Derrough	2360 W. Dorothy Lane	Suite 201	Dayton	OH	45439	937-294-7813	937-294-9164	wderrough@jefferies.com	UCC Professional
JPMorgan Chase Bank, N.A.	Richard Duker	520 Madison Avenue	12th Floor	New York	NY	10022	212-284-2521	212-284-2470	richard.duker@jpmorgan.com	Prepetition Administrative Agent
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Kurtzman Carson Consultants	Sheryl Belance	2335 Alaska Ave		El Segundo	CA	90245	310-823-9000	310-823-9133	sbelance@kcc.com	Noticing and Claims Agent
Latham & Watkins LLP	Robert J. Rosenberg	885 Third Avenue		New York	NY	10022	212-906-1370	212-751-4864	robert.rosenberg@lw.com	Counsel to Official Committee of Unsecured Creditors
Law Debenure Trust of New York	Daniel R. Fisher	400 Madison Ave	Fourth Floor	New York	NY	10017	212-750-5474	212-750-1361	daniel.fisher@lawdeb.com	Indenture Trustee
Law Debenure Trust of New York	Patrick J. Healy	400 Madison Ave	Fourth Floor	New York	NY	10017	212-750-5474	212-750-1361	patrick.healy@lawdeb.com	Indenture Trustee

Delphi Corporation  
Master Service List

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McDermott Will & Emery LLP	David D. Cleary	227 West Monroe Street	Suite 5400	Chicago	IL	60606	312-372-2000	312-984-7700	dcleary@mcdermott.com	Counsel to Rectical North America, Inc.
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McTigue Law Firm	Cornish F. Hitchcock	5301 Wisconsin Ave. N.W.	Suite 350	Washington	DC	20015	202-364-6900	202-364-9960	cfhitchcock@mtlaw.com	Counsel to Movant Retirees and Proposed Counsel to The Official Committee of Retirees
McTigue Law Firm	J. Brian McTigue	5301 Wisconsin Ave. N.W.	Suite 350	Washington	DC	20015	202-364-6900	202-364-9960	jbmctigue@mtlaw.com	Counsel to Movant Retirees and Proposed Counsel to The Official Committee of Retirees
Mesrow Financial	Leon Slezinger	666 Third Ave	21st Floor	New York	NY	10017	212-808-6366	212-682-5015	lslezinger@mesrow.com	UCC Professional
Milbank Tweed Hadley & McCloy LLP	Gregory A. Bray Esq Thomas R. Kreier Esq James E. Till Esq	601 South Figueroa Street	30th Floor	Los Angeles	CA	90017	213-892-4000	213-629-5063	gbray@milbank.com tkreier@milbank.com jtill@milbank.com	Counsel to Cerberus Capital Management LP and Dolce Investments LLC
Northeast Regional Office	Mark Schorfield, Regional Director	3 World Financial Center	Room 4300	New York	NY	10281	212-336-1100	212-336-1323	newyork@nrc.com	Securities and Exchange Commission
Office of New York State	Attorney General Eliot Spitzer	120 Broadway		New York City	NY	10271	212-416-8000	212-416-6075	office@attorneygeneral.state.ny.us	New York Attorney General's Office
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O'Malley & Myers LLP	Tom A. Jerman, Rachel Janger	1625 Eye Street, NW		Washington	DC	20006	202-383-5300	202-383-5414	tom@omlaw.com	Special Labor Counsel
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Shearman & Sterling LLP	Douglas Barner, Jill Frizzley	599 Lexington Avenue		New York	NY	10022	212-848-4000	212-848-7179	douglas.barner@shearman.com jill.frizzley@shearman.com	Local Counsel to the Debtors
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Skadden, Aps. State, Meagher & Flom LLP	John Wm. Butler, John K. Lyons, Ron E. Meisler	333 W. Wacker Dr.	Suite 2100	Chicago	IL	60606	312-407-0700	312-407-0411	jbutler@skadden.com jlyons@skadden.com rmeisler@skadden.com	Counsel to the Debtor
Skadden, Aps. State, Meagher & Flom LLP	Kayalyn A. Marafioti, Thomas J. Malz	4 Times Square	P.O. Box 300	New York	NY	10036	212-735-3000	212-735-2000	kmarafioti@skadden.com tmalz@skadden.com	Counsel to the Debtor
Spencer Fane Britt & Browne LLP	Daniel D. Doyle	1 North Brentwood Boulevard	Tenth Floor	St. Louis	MO	63105	314-863-7733	314-862-4656	dccoylespencerfane.com	Counsel to Movant Retirees and Proposed Counsel to The Official Committee of Retirees
Spencer Fane Britt & Browne LLP	Nicholas Franke	1 North Brentwood Boulevard	Tenth Floor	St. Louis	MO	63105	314-863-7733	314-862-4656	nfranke@spencerfane.com	Counsel to Movant Retirees and Proposed Counsel to The Official Committee of Retirees

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Togut, Segal & Segal LLP	Albert Togut	One Penn Plaza	Suite 3335	New York	NY	10119	212-594-5000	212-967-4258	atogut@tsgsllp.com	Conflicts Counsel to the Debtors
Tyco Electronics Corporation	MaryAnn Brereton, Assistant General Counsel	60 Columbia Road		Monticello	NJ	7960	973-656-8365	973-656-8805	maryann.brereton@tyco.com	Creditor Committee Member
United States Trustee	Brian Masumoto	33 Whitehall Street	21st Floor	New York	NY	10004-2112	212-510-0500	212-665-2255	brian.masumoto@usdoj.gov	Counsel to United States Trustee
Warner Stevens, L.L.P.	Michael D. Warner	1700 City Center Tower II	301 Commerce Street	Fort Worth	TX	76102	817-810-5250	817-810-5255	mwarner@warnerstevens.com	Proposed Conflicts Counsel to the Official Committee of Unsecured Creditors
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